



NATIONAL CONGRESS OF AMERICAN INDIANS

September 30, 2015

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

EXECUTIVE COMMITTEE

PRESIDENT
Brian Cladoosby
Swinomish Tribe

FIRST VICE-PRESIDENT
Randy Noka
Narragansett Tribe

RECORDING SECRETARY
Aaron Payment
*Sault Ste. Marie Tribe of Chippewa
Indians of Michigan*

TREASURER
Arlan Melendez
Reno Sparks Indian Colony

REGIONAL VICE-PRESIDENTS

ALASKA
Jerry Isaac
Native Village of Tanacross

EASTERN OKLAHOMA
S. Joe Crittenden
Cherokee Nation

GREAT PLAINS
Leander McDonald
Spirit Lake Nation

MIDWEST
Roger Rader
Pokagon band of Potawatomi

NORTHEAST
Lance Gumbs
Shinnecock Indian Nation

NORTHWEST
Fawn Sharp
Quinault Indian Nation

PACIFIC
Rosemary Morillo
Soboba Band of Luiseno Indians

ROCKY MOUNTAIN
Ivan Posey
Shoshone Tribe

SOUTHEAST
Ron Richardson
Haliwa-Saponi Indian Tribe

SOUTHERN PLAINS
Stephen Smith
Kiowa Tribe

SOUTHWEST
Manuel Heart
Ute Mountain Ute Tribe

WESTERN
Len George
Fallon Paiute Shoshone Tribe

EXECUTIVE DIRECTOR
Jacqueline Johnson Pata
Tlingit

NCAI HEADQUARTERS

1516 P Street, N.W.
Washington, DC 20005
202.466.7767
202.466.7797 fax
www.ncai.org

RE: NCAI REPLY COMMENTS IN THE MATTER OF LIFELINE AND LINK UP REFORM AND MODERNIZATION, WC DOCKET NO. 11-42; TELECOMMUNICATIONS CARRIERS ELIGIBLE FOR SERVICE, WC DOCKET NO. 09-197; AND CONNECT AMERICA FUND, WC DOCKET NO. 10-90

Dear Secretary Dortch,

On behalf of the National Congress of American Indians (NCAI), the oldest and largest representative organization of American Indian and Alaska Native tribal governments, I respectfully submit these Reply Comments on the *Second Further Notice of Proposed Rulemaking* to reform and modernize the Lifeline program. During the initial round of comments due August 31, 2015, several tribes and tribal organizations, including NCAI, proclaimed support for the preservation and expansion of the enhanced tribal Lifeline subsidy.

As technological capabilities and services continue to advance at ever-increasing rates, the Commission has attempted to keep pace by enacting regulations that support innovation, deployment, and adoption nationwide. The Commission has already exerted great effort to modernize its High Cost and E-rate programs to transition support to broadband services. However, many of the adopted reforms have provided new opportunities laced with barriers to tribal participation in universal service programs.

For instance, while the Commission adopted—and is providing ongoing reforms to the 2011 Connect America Fund—tribes are still trying to overcome barriers to participate in the Mobility and Tribal Mobility Fund auctions. Similarly, tribal rate-of-return carriers have been trying to preserve vital High Cost subsidies to support deployment on tribal lands, yet the Commission moved forward earlier this year with freezing the National Average Cost Per Loop Support mechanism absent tribal consultation. The Commission is now moving forward with the transition of Lifeline to support broadband, which many in Indian Country support, but NCAI also echoes tribal opposition regarding proposals to limit the enhanced tribal Lifeline subsidy to sparsely populated tribal lands.

OKLAHOMA TRIBES RECOGNIZE THE COMMISSION'S FAILURE TO HOLD PRIOR GOVERNMENT-TO-GOVERNMENT CONSULTATION REGARDING TRIBAL LANDS

NCAI strongly urges the Commission to ensure that the enhanced tribal Lifeline program will continue to support all low-income residents on all tribal lands. The Commission has already acted without prior, meaningful tribal consultation and input to redesignate what constitutes tribal lands in Oklahoma, which will result in

the disenrollment of low-income tribal members residing in the Oklahoma City and Tulsa areas. Instead of preserving and supporting this low-income program, the Commission has taken the unfortunate and blatantly offensive stance that low-income individuals are somehow responsible for the unscrupulous business practices used by some telecommunications providers to exploit the Lifeline program.

If the Commission had conducted outreach and consultation with the tribal nations of Oklahoma prior to its decision to change what constitutes tribal lands in Oklahoma, it would have received vital insight regarding the importance of this program to their members. The Inter-Tribal Council of the Five Civilized Tribes—representing the tribal governments of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations—filed a Resolution requesting the Commission to preserve its definition of “former reservation lands in Oklahoma”, and rejected the use of the *Historical Map of Oklahoma Reservations between 1870 and 1890 (Historical Map)*.¹ The Commission’s decision to adopt the *Historical Map* effectively excludes low-income tribal residents in central Oklahoma and Tulsa as eligible for the enhanced tribal lands subsidy.

While the Lifeline Report & Order (R&O) announced the Commission’s decision to change the meaning of “former reservations in Oklahoma”, the R&O called for consultation with Oklahoma tribes regarding the accurateness of the Historical Map. However, the primary flaw with this decision is the fact that the Commission failed to consult, or even conduct simple outreach or communications to Oklahoma tribes, before ruling to alter its recognition of Oklahoma tribal boundaries. Chief Gary Batton of the Choctaw Nation of Oklahoma filed comments in response to an FCC Consultation held after the adoption of the Lifeline R&O stating:

*If the FCC and other federal policy makers had properly followed the government-to-government protocols requiring tribal consultation in advance of making a federal policy decision affecting tribal communities, the tribes could have cleared up the FCC’s confusion earlier this year. While the Choctaw Nation of Oklahoma welcomes this month’s tribal consultation activity by the FCC, it is important to highlight the flawed nature of this effort. Tribal consultation must precede and inform federal decisions, not follow them. It is a perversion to use “tribal consultation” as a tribal pacifier.*²

Governor Eddie Hamilton of the Cheyenne and Arapaho Tribes of Oklahoma also raised concern over the lack of tribal consultation and urged the FCC to, “ensure that timely and meaningful consultation is taken prior to the adoption of any regulations that alter tribal nation, member, and land eligibility for Universal Service Funds.”³ Similarly, the FCC’s Native Nations Broadband Task Force (NNBTF)—represented by tribal leadership across the country, which includes leadership from Oklahoma—filed Reply Comments proclaiming that, “it appears that the Commission has taken leave of even its own Tribal consultation policy as outlined in its [2000] Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes,

¹ See filing of the Inter-Tribal Council of the Five Civilized Tribes, WC 11-42, WC 09-197, WC 10-90. Resolution No. 15-21, “A Resolution to Preserve the Universal Service Fund Lifeline & Link Up Programs”. Pg. 2. Received August 13, 2015. Available at <http://apps.fcc.gov/ecfs/comment/view?id=60001098462>.

² See Statement of the Honorable Gary Batton, Chief Choctaw Nation of Oklahoma, WC 11-42, WC 09-197, WC 10-90. “Tribal Government Consultation with the Federal Communications Commission”. Pg. 2. Received August 31, 2015. Available at <http://apps.fcc.gov/ecfs/comment/view?id=60001198800>.

³ See Cheyenne and Arapaho Tribes. Reply Comments, WC 11-42, WC 09-197, WC 10-90. Pg. 4. Received September 29, 2015. Available at <http://apps.fcc.gov/ecfs/comment/view?id=60001300686>.

FCC 00-207.”⁴ The NNBTF continues stating that, “. . .the Commission intends to discuss the matter of the newly adopted map with Tribal Nations, but wholly and completely after the fact of their own histories and borders, and the Commission’s Wireline Competition Bureau will judge that history and make changes only if and where necessary.”⁵

PRIOR AND MEANINGFUL TRIBAL CONSULTATION MUST BE EXERCISED BY THE COMMISSION

The Commission’s failure, if not blatant reluctance, to consult with Oklahoma tribal nations prior to its decision in the Lifeline R&O raises serious concern regarding future rulemakings that will have direct or indirect tribal implications. NCAI has been an active participant in the Commission’s proceedings for decades, yet lately it would appear that the Commission is settling into a habit of post-consultative work with tribal nations. Case in point, in June 2014 the Commission initiated a Further Notice of Proposed Rulemaking on reforms to the Universal Service Fund high cost support mechanisms, which provide critical ongoing capital and operating support to price cap carriers and rate-of-return telecommunications companies. Tribes operating eligible telecommunications carriers (ETCs) on their respective lands repeatedly brought this issue before NCAI seeking support to ensure that the Commission’s proposals would not disproportionately affect support for tribal lands.

At NCAI’s Annual Convention in Atlanta, GA in October 2014, NCAI’s membership adopted Resolution #ATL-14-076, “Calling on the Federal Communications Commission to Engage in Tribal Consultation Regarding Proposed Reforms to the High Cost Loop Support Mechanism in the Universal Service Fund”.⁶ The Resolution called on the FCC to, “immediately engage in formal government-to-government consultation prior to taking any additional steps to limit support provided to carriers serving tribal lands under the HCLS mechanism”.⁷

However, the Commission—after six months of proceedings to determine reforms to the high cost support mechanisms—neglected to engage in tribal consultation despite filings illustrating the devastating implications they could have on tribal support in Indian Country. On December 18, 2014, the Commission adopted interim reforms in a Report and Order to revise its methodology for distributing support under the High Cost Loop Support cap.⁸ Following the decision, NCAI filed a Petition for Reconsideration stating:

Despite having information in the record to this proceeding, the Commission has adopted rules that would substantially reduce support for broadband deployment to tribal lands and tribally-owned carriers that provide service to those lands. In addition to previous filings on this matter, the FCC was also notified of the importance of this issue after NCAI adopted a

⁴ See Native Nations Broadband Task Force. Reply Comments, WC 11-42, WC 09-197, WC 10-90. Filed by Lt. Governor Jefferson Keel, Chickasaw Nation of Oklahoma. Received September 29, 2015. Available at <http://apps.fcc.gov/ecfs/comment/view?id=60001300706>.

⁵ *Id.* Pg. 8.

⁶ See National Congress of American Indians. Resolution #ATL-14-076, “Calling on the Federal Communications Commission to Engage in Tribal Consultation Regarding Proposed Reforms to the High Cost Loop Support Mechanism in the Universal Service Fund”. Adopted October 2014. Available at http://www.ncai.org/attachments/Resolution_DRTmWXkkmUIDzLcAjZpNjfEnZHiQNGxtJPMryxZIZLZVDmlDPoF_ATL-14-076.pdf.

⁷ *Id.* Pg. 2.

⁸ See Federal Communications Commission. Report and Order, WC 10-90, WC 14-58, and WC 14-192. Released December 18, 2014. Available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-190A1.pdf.

*resolution in October 2014, expressing concern for the proposed reforms and calling on the FCC to engage in formal consultation before moving forward.*⁹

To date, the Commission has never acknowledged or followed up with NCAI regarding our Petition for Reconsideration on the December 2014 interim adopted reforms to the high cost support mechanisms. At NCAI's 2015 Mid Year Conference, tribes adopted NCAI Resolution #MSP-15-024, "Support for Policy on Universal Service Fund for Voice and Broadband Services on Tribal Lands", which referenced NCAI's Petition for Reconsideration and urged the FCC to, "create a high cost support tribal mechanism/factor or similar Universal Service Fund mechanism in the Rate-of-Return portion of the high-cost fund that addresses the unique and economic challenges for all carriers serving tribal lands."¹⁰ While tribes have continually met with and discussed this issue with the Commission it has remained unresolved to date.

Our reasons for raising this ongoing issue to the Commission in this proceeding—because it is not separate to issues contained in the Lifeline proceeding—is that tribal consultation has not operated in proactive measures the past year in at least two major rulemakings. Similarly, if the Commission is to limit Lifeline support to ETCs receiving High Cost support, the program becomes inextricably tied to the whims of the Commission's decisions regarding ongoing reforms to the High Cost Fund. While the Lifeline program is not and should not be viewed as a primary infrastructure deployment program, the Commission must be conscientious that support is needed for the high cost program to ensure Lifeline is promoting affordable service for adoption. The Commission must be proactive with tribal engagement and consultation to ensure that tribal matters and concerns are addressed prior to the adoption of rules that only impair tribes from accessing vital Universal Service Funds.

If you have any questions please contact NCAI Legislative Associate, Brian Howard, at bhoward@ncai.org.

Sincerely,



Jacqueline Pata
Executive Director
National Congress of American Indians

⁹ See National Congress of American Indians. Petition for Reconsideration, WC 10-90, WC 14-58, and WC 14-192. February 27, 2015. Pg. 1. Available at <http://apps.fcc.gov/ecfs/comment/view?id=60001024554>.

¹⁰ See National Congress of American Indians. Resolution #MSP-15-024, "Support for Policy on Universal Service Fund for Voice and Broadband Services on Tribal Lands". June 2015. Pg. 2. Available at http://www.ncai.org/attachments/Resolution_PyIIlBajBNmKMBimwldHKzaoSbbcBxZOyXbxgWuLJFIMjFSOPwd_MSP-15-024.pdf.